Supreme Court, U.S.
FILED

001222 JAN 29 2001

OFFICE OF T

No. 00-

IN THE

Supreme Court of the United States

NORMAN K. JONES,

Petitioner,

v.

THE PENNSYLVANIA MINORITY BUSINESS DEVELOPMENT AUTHORITY (PMBDA); ISABELLE SMITH; EUGENE HESS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

FINCOURT SHELTON
Attorney for Petitioner
Six North Ninth Street
Suite 201
Darby, Pennsylvania 19023
(610) 532-5550

10 PP

QUESTIONS PRESENTED

I.

Under Federal Rule of Civil Procedure 56, may disputed material facts, either be ignored or construed by the Court in the favor of the movant for summary judgment?

II.

Under the Americans with Disabilities Act, Title II, must a plaintiff survive summary judgment when he is able to prove that discrimination played a role in the adverse action against him?

III.

Under the Americans with Disabilities Act, Title II, must a Plaintiff survive summary judgment when he proves, either with direct or circumstantial evidence that the reasons given for the adverse action are pretextual, or which a reasonable jury could find pretextual?

IV.

Under the Americans with Disabilities Act, Title II, may the Defendant be excused of its burden to prove, what if any of its program requirements are "essential eligibility requirements"?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Cited Authorities	iv
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Statutory and Regulatory Provisions Involved	1
Statement of the Case	2
A. Course of Proceedings	2
B. Direct Evidence of Disability Discrimination	3
C. PMBDA's Articulation Of Reasons For Loan Commitment Rescission	9
D. Petitioner's Evidence of Pretext	14
Argument	22
A. Summary Judgment Is Not Appropriate When There Exist Disputed Issues of Material Fact Particularly Regarding the Alleged Reasons for an Adverse Action	22

Contents

Page

B. A Plaintiff in an Americans with Disabilities Act Title II Claim Must Survive Summary Judgment When He is Able to Prove That Discrimination Played A Part in an Adverse Action Against Him 25

C. In An Americans With Disabilities Act, Title II Claim, a Plaintiff Must Survive Summary Judgment When He Produces Evidence Directly or Indirectly Contravening the Defendants Proffered Reasons for Its' Adverse Action 27

D. In an Americans with Disabilities Act, Title II Claim, The Defendant Has an Unexcusable Burden of Proving What if Any of Its' Program Requirements are Essential Eligibility Requirements 29

Conclusion 30

TABLE OF CITED AUTHORITIES

Page

Cases:

Aman v. Cort Furniture Rental Corp, 85 F.3d 1074 (3d Cir. 1996) 26

Anderson v. Liberty Lobby, Inc. 1065 Ct. 2505 (1986) 22

Antol v. Perry, 82 F.3d 1291 (3d Cir. 1996) 22, 23, 26, 28

Armbruster v. Unisys Corp. 32 F.3d 768 (3d Cir. 1994) 23

Boyle v. County of Allegheny Pennsylvania, 139 F.3d 386 (3d Cir. 1998) 23, 25

Celotex Corp v. Catrett, 106 S. Ct. 254 (1986) 22

Fuentes v. Perskie, 32 F. 3d 759 (3d Cir. 1994) ... 23

Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) 28

Levin v. Marder, 343 F. Supp. 1050 (D.C. Pa. 1972) 24

Matsushita Electric Indus. Co. v. Zenith Radio, 106 S. Ct. 1348 (1986) 22

McDonnell - Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973) 27

Cited Authorities

Page

Parasco v. Pacific Indemnity Co. 920 F. Supp. 647 (E.D. Pa. 1996) 24

Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989) 26, 27

Reeves v. Sanderson Plumbing Products, Inc., 197 F.3d 688 (2000) 27, 28

Roebuck v. Drexel University, 852 F.2d 715 (3d Cir. 1988) 28

St. Mary Honor Center v. Hicks, 509 U.S. 502, 113 S. Ct. 2742 (1993) 27

Straithie v. Department of Transportation, 716 F.2d 277 (3d Cir. 1983) 29

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089 (1981) 27

Statutes:

28 U.S.C. § 1254(1) 1

42 U.S.C. §§ 12131-12133 1

Rules:

Fed. R. Civ. P. 56 ..... i, 2

OPINIONS BELOW

The order and opinion of the Court of Appeals which is not reported is set out at pp. 1a-17a to the Appendix to the Petition for Writ of Certiorari. The order and opinion of the District Court granting Respondent's motion for summary judgment and denying Petitioner's motion for summary judgment, which is not reported is set out at pp. 18a-33a to the Appendix to the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered on July 28, 2000. A timely petition for rehearing and suggestion for rehearing en banc were denied on October 31, 2000. The order denying the petition for rehearing is set out at pp. 34a to the Appendix to the Petition for Writ of Certiorari. Jurisdiction of the Court exists under 28 U.S.C. § 1254(1).

CONSTITUTIONAL STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Americans with Disabilities Act, 42 U.S.C. §§ 12131-12133 provides, in pertinent part:

12131

(2) Qualified individual with a disability.

The term a qualified individual with a disability means an individual with a disability who, with or without reasonable modification to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of

services or the participation in programs or activities provided by a public entity.

12132 Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Federal Rule of Civil Procedure 56, provides in pertinent part:

(c) Motion and Proceedings Thereon. . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and, that the moving party is entitled to a judgment as a matter of law . . . .

STATEMENT OF THE CASE

A. Course of Proceedings

Petitioner, Norman K. Jones, II, (Mr. Jones or Jones) brought this action for disability discrimination against Respondent the Pennsylvania Minority Business Development Authority (PMBDA) for denying his sole shareholder corporation, Street Sounds Recording and Production Company (Street Sounds) the benefit of a Sixty Thousand Dollar loan under its' Direct Loan Program R. 33-47, 50, 602-605. After the parties had discovery, the District

Court denied Plaintiff's summary judgment motion and granted Defendant's summary judgment motion.

After receiving the evidence de novo, the Third Circuit affirmed the District Court's ruling concluding that:

(1) "Jones failed to meet the requirements set forth in the commitment letter and, consequently did not qualify for the PMBDA loan". (app. 31a);

(2) "we reject Jones' contention that the collateral and equity injection requirements were not "essential" to receiving the PMBDA loans". (app. 32a);

(3) "The few times that Jones' disability was mentioned in connection with his loan application, therefore do not support his contention that he suffered an "adverse . . . decision as a result of discrimination". (app. 33a) Mr. Jones Petition for Rehearing was denied on October 31, 2000. What follows is a summary of the evidence offered to the District Court at the summary judgment stage, which shows that Jones proved that disability discrimination played a role in the decision against him.

B. Direct Evidence of Disability Discrimination

Mr. Jones became disabled in 1991 while employed at the United States Postal Service acquiring an adjustment disorder with mixed emotional features, and generalized anxiety disorder and post traumatic stress disorder. R. 22-24, 124-26, 149-51, 934-83.

Although he was disabled from his employment that he worked under supervision, according to his psychologist,

Dr. Cimmet, he was not restricted from self-employment. In 1995, Mr. Jones applied for a loan from PMBDA for his sole stock shareholders corporation, Street Sounds Recording and Production Company, which he had created prior to becoming disabled. The corporation had never earned any significant profit and was essentially a "paper corporation" R. 39, 46, 52, 125-26. As a part of PMBDA's loan application process Jones had to reveal all of his sources of income which included Federal Workmen's Compensation payments he was receiving as a result of his disability R. 152-53, 321-23.

The Executive Director of the PMBDA, Isabelle Smith upon becoming aware of the disability, told her subordinate that PMBDA could not make a loan to Jones because he was disabled. The following are excerpts of the deposition testimony of Ms. Smith:

> Q: Wasn't it a requirement of the PMBDA that any person who received a loan from the PMBDA quit their full time employment and devote full-time to the loan project?
>
> A: Yes. That's one of the requirements, which is why I keep telling you — I have come back as to if Mr. Jones was eligible, because he was getting disability payments, and if those disability payments were going to continue. R. 574.
>
> Q: But you referred to his mental disability on <u>several</u> (emphasis-added) occasions in writing, did you not?
>
> A: That was in reference to whether he was qualified for a PMBDA loan. R. 518.

Q: Did anyone tell you that they suspected that Mr. Jones might not be able to manage Street Sounds because of a disability?

A: No. R. 520.

Q: To your knowledge, was anyone else concerned about the issue of mental disability or disability?

A: Yes.

Q: Who?

A: Two of the Board members. R. 522.

Q: Do you recall discussions or communications or communicating with Emily White about the issue of disability?

A: I may have in the context as to whether he was able to manage the business. R. 572.

Keblin Carolina, PMBDA's Eastern Regional Supervisor, testified in his deposition as follows:

A: Well it was an ongoing battle (emphasis added) as I recall from the beginning of the project, going back prior, probably the latter part of '94', early '95' regarding the applicant's qualifications in general. There was none indicated in the application about a disability that Mr. Jones — a disability income that Mr. Jones was receiving, and Isabelle always (emphasis added) questioned in the beginning whether or not this applicant was eligible for financing due to this disability (emphasis added) . . . I had no indication that there was a mental disability in my mind R. 161-62.

A: I had a discussion with Isabelle on this project . . . and her first concern was a question regarding disability, that was an issue. R. 185.

Q: Okay do you have any specific recollection of what was discussed regarding his alleged disability?

A: Well, the first comment I remember hearing from Isabelle Smith, and I'm not sure of it was only in writing or if it was verbally communicated to me was that we cannot help this project because he was on disability. (emphasis added). He was totally disabled or on permanent disability, something to that effect.

Q: But the discussion and the e-mail would have been, if not contemporaneous about the same time?

A: Yes, yes. Because it was discussion surrounding disability. But initially it was like we can't help this guy or we can't do a deal because there is disability (emphasis added). I said well the disability as I understand it was stress related to his prior work experience. R. 191.

Q: Okay well let me ask you this, though. When you first had your conversation with Isabelle Smith and she raised in the context of being able to manage the business (emphasis added)

A: No. Just used in the context of seeing disability in the application and you know, just shooting from the hip saying, well, we can't help, this guy is on permanent disability, without finding out what the disability is . . ." R. 194.

Q: Did you tell Isabelle Smith what your understanding of his disability was?

A: Yes, I did.

Q: So, I know from Isabelle's perspective if she thought his disability precluded him from running this business, it would have been better to say well, Kelbin, do you have any concern about . . . R. 198.

A: Well, the time frame would be from the very beginning, okay starting with the issue of the disability. In all my years of experience as a lender, what I found is that she (emphasis added) only needs to find one reason to turn down a deal. And you know, you can do the smoking mirrors piece, but if you have that one issue, you could have been disapproved on that one issue . . . I mean you can have all of your collateral in place, all of your equity in place, but you can find some other reason not to do a deal. R. 220.

Mr. Carolina testified that if Ms. Smith had any legitimate concern about Mr. Jones' worker's compensation status, that should have been referred to PMBDA's legal office. He did not recall this occurring. R. 210.

Mr. Carolina warned Ms. Smith about her negative posture on disability and told her he observed no impediment to Jones managing Street Sounds. R. 470.

Ms. Smith was not legitimately concerned with whether Jones' disability income might be discontinued if Street Sounds received a loan, as she did not even bother to investigate the alleged issue with the United States Department of Labor R. 575-76. Ms. Smith required that Mr. Jones have an independent source of income other than

profits from the loan project, his disability income, which nondisabled applicants need not have. R. 655-56.

Ms. Smith wrote an e-mail to Keblin Carolina telling him that Jones' disability was a problem, three days before the loan project was submitted for initial approval to PMBDA's Loan Evaluation Committee. R. 317.

Ms. Smith and Ms. Chavez wrote notes on the loan application "Turnover Checklist" (a PMBDA mechanism addressing the various items that needed to be completed to secure the loan), essentially questioning Jones' ability to manage his business because he was disabled. At the Loan Evaluation Committee Meeting, Smith and Karen Shaffer, another PMBDA employee questioned Jones in front of a room of people about his disability. R. 123. Other PMBDA employees involved in the loan process believed Jones' disability was a "problem". R. 521-23.

In April 1996, while Jones was in the process of completing loan closing requirements, Smith wrote an e-mail to Emily White, Chairman of the PMBDA Board of Directors, misrepresenting that Jones did not have enough money to make an equity injection into the loan project as allegedly required by PMBDA and again citing disability as "adverse information" and a possible reason to rescind the loan commitment. R. 775.

In August 1996, during a meeting with PMBDA employee Eugene Hess, Hess inexplicably asked Jones whether he was still receiving disability income. In the same conversation, Hess told Jones that even if he met all of the loan requirements, the loan was not guaranteed to close. R. 132. Shortly after that meeting, Smith met with Hess to discuss loan rescindment. She also met with White to discuss

the same, referencing disability as an issue R. 562-64, 570-72.

PMBDA had anti-discrimination policies, including for disability and its' requirements are silent on the issue of whether disability can be a possible disqualifier for loan eligibility. R. 161-63.

C. PMBDA's Articulation Of Reasons For Loan Commitment Rescission

Despite Isabelle Smith's denouncement of loaning to Street Sounds, PMBDA's internal structure allowed Kelbin Carolina to more or less attempt to push the loan package through the various levels of approval without Ms. Smith's blessing and without the blessings of other specific persons who believed that Jones' disability disqualified him for loan eligibility. Mr. Carolina presented the loan package first to PMBDA Loan Evaluation Committee (LEC) on July 13, 1995, which approved sending the package to the PMBDA Board of Directors for subsequent review. Isabelle Smith was not a voting member of the LEC. R. 635. At the time of the LEC, Mr. Jones was required to pledge collateral. He did so consisting of two pieces of real estate he owned, including his home. R. 127, 176, 784. PMBDA was aware that one of the properties might be restricted from a second mortgage by it, because it was a Veteran's Affairs property R. 176. Additionally, Ms. Smith required that Jones designate a business address other than his home address, although PMBDA had no policy against home based business and had funded them in the past. R. 121-29, 347, 471-72, 643. Mr. Jones designated his apartment at 2318 Rosemore Avenue, Glenside, PA as his business address. R. 472. He lived in one of his other properties, a multiple unit home,

which he had previously rented out, foregoing rent for the room he lived in throughout the loan process. R. 128.

On July 27, 1995, the PMBDA Board of Directors (Board) received the Street Sounds application which included its' Business Plan and Financial Forecast. The Board also reviewed an assessment of the proposed loan project created by PMBDA's own financial consultant, EXICO. EXICO documented and presented the following to the board: (1) that Street Sounds was a "new" business for which historical financial information was not applicable; (2) that Jones had significant experience in the music industry (he had produced successful records for another recording label); (3) that Street Sounds had done no business in the previous three years because it was nonfunctional.

The Board discussed that there was a real estate collateral deficiency of around $24,000.00 for the $60,000.00 loan. To supplement the real estate collateral, the Board decided that Street Seconds' recording contract with performer Mia Evans would be assigned to PMBDA as collateral. R. 346-49, 372-76. Additionally, Mr. Jones pledged approximately $12,000.00 in business equipment, including musical recording equipment, office equipment and furniture. Due to Street Sounds lack of activity, practically, there was little depreciation to the equipment. R. 332, 356. The PMBDA Board of Directors approved the loan commitment of $60,000.00, despite the real estate collateral deficiency of around $24,000.00. R. 372-76. Again, as with the LEC, Isabelle Smith was not a voting member of the Board, nor did she present the loan package to it. R. 292, 635.

On July 27, 1995 Ms. Smith sent Mr. Jones a letter informing him that the loan commitment had been extended

and also cautioning him not to make significant business expenditures in reliance on the loan commitment without PMBDA's authorization. R. 396.

On August 18, 1995, PMBDA sent Mr. Jones a loan commitment letter, which purported to contain the required loan conditions. R. 783-89.

From around September 15, 1995 when Mr. Jones signed the commitment letter, until around April 1996, Jones set about accomplishing the items in the commitment letter. During this time, Mr. Carolina who had worked closely with Mr. Jones on the loan application, left the employment of PMBDA. For unknown reasons for a period of time, there appeared to have been nobody assigned to process the Street Sounds application and field Mr. Jones' questions about the requirements.

Attempts were made to schedule loan closings, one finally occurring on April 3, 1996. Although Mr. Jones had been working with PMBDA's legal counsel Nwenda Adele, Mr. Adele did not attend the closing, rather PMBDA's only representative there was its' escrow agent, Mr. Osunipebi. R. 824. As of April 3, 1996, Mr. Jones had still not been able to receive PMBDA's requested mortgage waivers on the properties he pledged as collateral (although the waiver on 450 E. Walnut Lane, his home was received shortly thereafter). R. 130-34, 825-26.

At the April 3, 1996 closing, Mr. Osunipebi escorted Mr. Jones to Mellon Bank, Cheltenham, PA, for the purpose of opening up an escrow account to deposit the loan proceeds and Mr. Jones equity injection of twenty-five percent of the project cost, or $20,000.00. However, because Mellon Bank refused to sign PMBDA's anti-discrimination policy, Mr.

Osunipebi refused to open the escrow account and left with PMBDA's check. Nor did he attempt to open the escrow account at another bank R. 130-31, 823. Under PMBDA's written procedure, it was its' responsibility to establish and manage the escrow account. R. 245, 793.

Shortly after closing, PMBDA required Mr. Osunipebi to return the loan check to Harrisburg. R. 823.

Ms. Smith and Mr. Hess both informed Emily White, chairman of the PMBDA Board of Directors, that Mr. Jones did not have the required money for the equity injection at the time of the April 3, 1996 closing. R. 367, 369, 775. Ms. Smith sent e-mail to Ms. White criticizing the efficiency of the entire loan project and citing disability as adverse information and asking if the loan could be pulled back. R. 775.

Mr. Hess wrote to Ms. Smith, that Street Sounds was supposed to have been making profits (despite EXICO's presentation that it was a new business). R. 344, 346, 349.

Mr. Hess told Mr. Jones that a new closing would be scheduled and that a new commitment letter would be written R. 790. On April 26, 1996, Ms. Smith wrote Mr. Jones a letter requiring him to pledge substitute collateral for the Veteran's Affairs' property at 6013 Magnolia Street. She also required that he use business expenditures, rather than cash to show his equity injection. R. 774.

At Mr. Jones' request, PMBDA revised the use of funds for the loan. Mr. Jones requested $20,000.00 for unrestricted working capital. PMBDA allowed $10,000.00. R. 344, 376.

Mr. Jones sent in receipts and documentation reflecting that he had already injected $33,000.00 into Street Sounds. R. 797. PMBDA told him that only expenditures after July 1, 1995 would be credited. R. 136. Mr. Jones provided receipts for business expenditures for $11,000.00 and the corporation's purchase of equipment from stockholder (Jones) in the amount of approximately to $11,000.00. R. 335-37, 795. These were post July 1, 1995 expenditures. Mr. Hess acknowledged in writing that the business expenses exceeded $20,000.00. R. 795.

Regarding the required substitute collateral, Jones pledged 6009 Magnolia Street, which he had purchased as a contingency in case 6013 Magnolia Street could not be pledged. The 6009 Magnolia Street property was professionally appraised at a slightly higher value than that of 6013 Magnolia Street. R. 776, 791. Mr. Jones spent $5,000.00 in closing costs for the property which he informed PMBDA would be used for a rehearsal studio. R. 379, 382-94.

In early August 1996, Ms. Smith told Mr. Jones he must come from Philadelphia to Harrisburg for a meeting with Mr. Hess and her, or that the loan commitment would be immediately rescinded. R. 132. Mr. Jones appeared for the meeting on August 12, 1996 and met with Mr. Hess. Ms. Smith was not at the meeting. At the meeting, Mr. Hess asked Mr. Jones whether he was still receiving disability income and told him that even if all of the loan requirements were met, the loan still was not guaranteed to close. R. 132.

In/around August-September 1996, Ms. Smith met with Mr. Hess and Emily White to discuss loan commitment rescindment, referencing disability as an issue of consideration R. 562-64, 570-72. After consultation with

Hess, she wrote Mr. Jones on September 9, 1996, informing him that the loan commitment would be rescinded, essentially citing three reasons as follows: (1) failure to show the ability to make a $20,000.00 equity injection into the loan project; (2) insufficient collateral; (3) likelihood that based on previous lack of profits, that the business could not repay the loan R. 778-79.

Mr. Jones' attorney Mr. Harper wrote a letter to Ms. Smith requesting reconsideration of her decision essentially stating the following: (1) that PMBDA had told Mr. Jones that his preloan expenditures could be used for the equity injection, that PMBDA had already credited at least $11,000.00 for equity by its' own admission and that Mr. Jones could if necessary make the equity injection in cash; (2) that Ms. Smith's letter did not accurately reflect the level of collateral pledged, nor that previously excepted by the PMBDA Board of Directors, and that if all the collateral were counted the loan was almost fully collateralized; (3) that Street Sounds had been presented as and accepted as by the Board of Directors as a new business for which no historical financial information was applicable. R. 780-81. Ms. Smith refused the request for reconsideration and personally presented her resolution for loan commitment rescission to the Board of Directors on September 26, 1996. There, she stated and wrote that Street Sounds failed to show the ability to make the equity injection, did not pledge sufficient collateral and did not show the ability to repay the debt. R. 602-05.

D. Petitioner's Evidence of Pretext

Mr. Jones challenged as downright fabrications practically every item of Defendant's evidence. Mr. Jones provided evidence, including the direct evidence of disability

animus, that PMBDA, through Ms. Smith, Mr. Hess, Ms. Chavez, Ms. White and others deliberately acted to confound him throughout the loan process.

First, although Mr. Jones informed PMBDA that he planned to operate the business from his home, arbitrarily PMBDA required that he designate a separate business address from his home, causing him to forego rent in the property he used as his residence. R. 38-54, 128-29, 153-54, 347, 643.

A PMBDA employee falsely documented that PMBDA did not fund home based business. R. 339. Mr. Carolina deposed this was patently false, that not only did PMBDA's regulation not restrict such funding, but that PMBDA had funded other home based businesses. R. 471-72.

Early in the loan process, as per PMBDA's requirement, Mr. Jones provided bank account statements reflecting money and other easily liquidable assets totaling around $27,000.00, which was to be used to make the $20,000.00 equity injection. R. 325-329. As of April 3, 1996, the closing and September 26, 1996, the loan rescission, Mr. Jones had over $20,000.00 available for an entire cash equity injection if necessary. R. 415-461. As late as September 26, 1996, he had cash in bank accounts, liquidable stock and mutual funds, and a line of credit exceeding $5,000.00. R. 417, 421, 431-34, 440, 447, 457. In/around April 1996, before the closing Mr. Jones provided PMBDA with documentation reflecting his ability to make an entire cash equity injection at the closing. R. 6633-34.

Ms. White instructed Ms. Smith to review the Street Sounds file to see where the equity injection would come from. Ms. Smith refused to do so. R. 692-93.

Despite this, both Smith and Hess continued to misrepresent to the LEC and the Board that Jones simply did not have the money for the equity injection. R. 367, 369, 774-75. Mr. Osunipebi, the only PMBDA agent at the April 3, 1996 closing, testified that he did not know one way or the other whether the money was available because they never got to the stage of depositing monies. R. 807-09.

By PMBDA's own procedures a loan applicant need not prepare the ability to make the equity injection prior to closing. R. 783-89, 846. Even Ms. Smith testified regarding proof of equity:

> "It could be done at closing. They had to have proof of it when they were applying for the loan". R. 546.

Therefore, after Jones had submitted his bank statements at the onset of the application process, he was not required to again prove the ability to make the equity injection until the time of closing.

Despite, PMBDA's contentions about a cash equity injection, its' own procedures allowed the injection to be done by all cash, all business expenditures, including expenditures predating the loan application date, or a combination of both. R. 550, 600-601. As stated above, Mr. Hess documented that Street Sounds had provided proof of business expenditures over $20,000.00 R. 795. There is absolutely no evidence that Mr. Hess rejected any of the "paid in capital."

As stated above Smith admitted that Street Sounds showed proof of $11,000.00 in business expenditures. Mr. Carolina deposed that additionally credit should have been extended for the pledged business equipment and furniture, regardless of when it was purchased, if it was not fully depreciated. PMBDA's procedure of valuing equipment was at fifty percent of the purchase price. R. 353, 476, 856. In fact in the August 18, 1995 commitment letter, the equipment was counted as collateral and valued at $5,000.00. R. 783-84. It strains belief how the equipment could have a value for collateral purposes but not for equity, particularly since it was the very equipment which would be used to produce the music, the purpose of the loan project. At a minimum equity credit of $5,000.00 should have been extended for the equipment. Mr. Jones purchased 6009 Magnolia Street for collateral and informed PMBDA in writing, that it would be used for the business as a rehearsal studio. Mr. Hess told Jones that if the property was to be used for a business purpose then the closing costs would be credited as equity. Mr. Jones spent $5,000.00 in closing costs. R. 872, 5674, 5678.

Mr. Jones had already spent over $33,000.00 on the dormant corporation, which PMBDA arbitrarily refused to accept for equity purposes. R. 796-97. This was despite that PMBDA had accepted Street Sounds as a "new" business due to its past inactivity and need for funding. R. 346, 474.

PMBDA never corresponded with Jones until the time of the loan rescission, to inform him that it did not accept his proposed equity despite that Jones wrote Hess on August 28, 1996, asking for any unresolved issues. R. 309. Mr. Hess reneged on his promise of a new commitment letter and a new closing. R. 790. There is an absence of any new

PMBDA requests for equity in Mr. Hess's writings, including requests for additional bank receipts.

While it should have been irrelevant to PMBDA for equity purposes, that Jones was receiving approximately $21,000.00 in disability payments yearly, Smith falsely testified that the equity injection was to come from those payments. R. 654-59, 681-82. Smith contradicted her testimony regarding the relevance of disability income by stating that the business had to be able to meet debt service on its' own. Also, incredibly, all of PMBDA's procedures and documentation, including the commitment letter contemplated a one-time equity injection, if it had not already been shown with business expenditures. R. 325-29, 546-48, 783-89. It was unbelievable that Smith would suggests that the equity injection could be done over a period of time with monthly income.

Totaling all of the equity that PMBDA accepted and should have accepted, at a minimum, $11,000.00 for business expenses, $5,000.00 for equipment and furniture and $5,000.00 for the closing costs on the home to be used as a rehearsal studio, Street Sounds' equity injection was $21,000.00 without any additional cash. Unbelievably Ms. Smith testified that Street Sounds was extended zero credit for equity. R. 771-73, 774-75.

PMBDA's articulated reason of insufficient collateral is equally as unconvincing as its' accusation of inability to make the equity injection. After Mr. Jones substituted 6009 Magnolia Street for 6013 Magnolia Street, his collateral position increased, not decreased from that which was originally accepted by its' Board Directors. The later

property was professionally appraised at a higher value. R. 776, 791.

By PMBDA's written procedure, the value to be allotted for collateral, was eighty percent of that which was professionally appraised. R. 792. Here, PMBDA refused to follow its own procedures for valuing collateral. In Ms. Smith's September 9, 1996 letter, not only did she not follow PMBDA's procedure for valuing collateral, she did not even bother to address all of the collateral, including the real estate at 450 E. Walnut Lane, equipment and furniture, stock, money from bank accounts and Mia Evans' contract, all of which were required as collateral by the commitment letter. R. 778-79, 783-89. Ms. Smith's misrepresenting letter was copied to Ms. White and other PMBDA employees involved in the decision to rescind the loan commitment. As Ms. Smith signed the August 18, 1995 commitment letter, her omission of the majority of the collateral in the later writing can only be construed as a purposeful act - a lie. Additionally, the PMBDA procedures do not address purchase price as a criteria in assessing the worth of the collateral, as Smith did in the September 9, 1996 letter.

By falsely giving the impression that Mr. Jones collateral level had sunk, effectively Smith unilaterally undid the deal that had been made by PMBDA's Board of Directors on July 27, 1995, when it approved the loan with a $24,000.00 real estate collateral deficiency. R. 372-76.

Regarding the ability to meet debt service, the September 9, 1996 letter again misrepresented the facts that had already been addressed at the July 27, 1995 meeting, that Street Sounds was accepted by the Board as a "new business" and that historical financial information was not relevant in assessing its' ability to repay the debt. Ms. Smith deliberately

deceived Ms. White and the Board regarding this issue. Ms. Smith's deposition testimony belies her contention that Street Sounds would be unable to meet the debt. She admitted the following: (1) that she did not disbelieve Street Sounds net sales projections, which greatly exceeded the debt. R. 716-21; (2) she knew virtually nothing about the music industry with which to gauge whether success would occur. R. 714; (3) she purposely failed to familiarize herself with the details of the loan project, which were relevant to the ability to meet debt service. R. 618; (4) she did not know key elements about the loan project including the past successes of Mr. Jones, Mia Evans, and Mr. Berstein (a consultant who had produced multiple gold selling albums and single recordings). R. 620-30.

Additionally she testified to an objective list of criteria to be used to determine if the debt could be repaid, all of which were existent in the case of Street Sounds. R. 21-25; 617-18.

Despite that Street Sounds was presented as a new business, Smith and Hess repeatedly misrepresented that it was an ongoing concern for which profits should have been derived. R. 346, 704-09. Ms. Smith sent a letter to Mr. Jones on July 27, 1995, which she testified that he could reasonably interpret as instructing him not to make new business purchases prior to the loan closing. R. 396-97, 756-59. Thus, it was totally contradictory and incoherent for her to later attempt to falsely present the impression that Street Sounds was an ongoing concern that had attempted to, but failed to make sales for four years. EXICO's presentation at the July 27, 1995 Board meeting discredited Smith's representation that the loan project was not viable. R. 346-57.

Other evidence of pretext included the following. Smith and Hess repeatedly lied that Jones did not have money available for an equity injection at the April 3, 1996 closing. R. 367, 369, 774-75. This was despite that the only person who could verify this was Mr. Osunipebi, who testified he never made such a representation to anyone. R. 807-09. Mr. Carolina testified that Smith disfavored loaning to Street Sounds and tended to make purposeful misrepresentations about projects she disfavored. R. 219-20.

Ms. Smith violated PMBDA's written procedures for loan rescindment. First, she bypassed the forum for developing resolutions for rescindment, the PMBDA Workout Committee. This Committee consisted of 7-10 people and required a consensus. R. 299, 560. The resolution for rescindent was "illegal." Smith, Hess and PMBDA refused to allow the procedurally required thirty days between the notice of the decision to rescind and the actual Board decision, allowing only 17 days. R. 299. The date of notice was September 9, 1996 and the decision occurred on September 26, 1996. R. 774-75, 826-36.

Ms. Smith violated PMBDA procedures by refusing to respond to Mr. Harper's letter requesting reconsideration. The procedure required her to respond. R. 309. Ms. Smith admitted that the decision to rescind could have been deferred in order to properly address the request for reconsideration. Smith left employment with PMBDA within four days after the decision to rescind. R. 559, 602-05. Ms. Smith purposely concealed Mr. Harper's request for reconsideration from the Board.

Other evidence included, Smith unbelievably insisting that the August 18, 1995 commitment letter explained to Jones his options to use other than cash for the equity

injection. The letter clearly suggests only a cash injection. R. 783-84. PMBDA was aware at the early stage of the loan process that Jones' Veteran's Affairs property might be restricted as collateral. R. 176. Smith threatened Jones with immediate loan rescission if he did not attend the August 12, 1996 meeting. This violated PMBDA's procedures for rescindment. R. 299. PMBDA attempted to give the false impression that Jones, rather than its' escrow agent was responsible for establishing the escrow account. R. 294, 478, 551, 5560-64. Despite the fact that in practice PMBDA excused collateral altogether if an applicant's net worth exceeded the loan amount, PMBDA refused this practice for Mr. Jones, although his net worth exceeded the loan amount by approximately $40,000.00. R.152-53, 932.

ARGUMENT

A. Summary Judgment Is Not Appropriate When There Exist Disputed Issues of Material Fact Particularly Regarding the Alleged Reasons for an Adverse Action

Summary judgment should only be granted when the evidence demonstrates that there is no genuine issue of material fact left to resolved a trial. Celotex Corp v. Catrett, 106 S. Ct. 254; 2552 (1986). To survive summary judgment, the non-movant only needs to point to evidence demonstrating the existence of a genuine dispute of material facts, requiring a jury to resolve the parties' different versions of the facts. Anderson v. Liberty Lobby, Inc. 1065 Ct. 2505, 2510 (1986); Matsushita Electric Indus. Co. v. Zenith Radio, 106 S. Ct. 1348, 1355 (1986).

At the summary judgment stage, a plaintiff need not provide evidence directly contradicting the defendant's proffered reasons. Antol v. Perry, 82 F. 3d 1291, 1300 (3d

Cir. 1996). Fuentes v. Perskie, 32 F. 3d 759, 763 (3d Cir. 1994). The nonmovant need not match item for item, each piece of evidence proffered by the movant, but must simply exceed the "mere" scintilla standard. Boyle v. County of Allegheny Pennsylvania, 139 F.3d 386, 389 (3d Cir. 1998). A plaintiff can survive summary judgment by providing sufficient evidence from which a reasonable factfinder could (not must) infer pretext. Armbruster v. Unisys Corp. 32 F.3d 768, 782-83 (3d Cir. 1994). Because discrimination cases turn on the state of mind and credibility of the defendant, summary judgment generally is inappropriate in their contexts.

The evidence laid out in the statement of the case above clearly proves that genuine material issues of fact exist regarding the PMBDA's articulated reasons for its' rescindment of a loan commitment to Street Sounds. Mr. Jones has either directly or indirectly contradicted each of the proffered reasons and must therefore survive summary judgment. In summary, perhaps foremost, Jones proved that Ms. Smith simply lied regarding the issue of collateral by intentionally misstating the collateral value in her September 9, 1996 letter. In fact, the collateral level never decreased from that which the PMBDA Board of Directors excepted on July 27, 1995.

Jones also proved that Smith purposely misrepresented facts regarding Street Sounds ability to meet the debt in the September 9, 1996 letter, by pointing to the years of lack of profit. This was after the Board had already been briefed by PMBDA's own EXICO, that Street Sounds was a "new business" for which historical financial information was not applicable. A reasonable factfinder could clearly interpret Smith's actions as intentionally deceiving. Because Street Sounds was a new business, there simply is a genuine issue

of material fact as to whether it could meet debt service as well as a genuine issue of material fact as to whether Smith and PMBDA believed debt service could be met.

As stated above, Smith did not disbelieve the projections for net profits, which exceeded the loan amount.

Finally, Jones has proven piece by piece that he obtained at least $21,000.00 in equity which satisfied the $20,000.00 equity injection. All of the expenses, including business rent, equipment to be used by the business for the business purpose and closing costs on a property to be used by the business for a rehearsal studio can be no other than legitimate equity. Moreover, Mr. Hess admitted in writing that the paid in capital exceeded $20,000.00.

Additionally if for some reason, which defendant's evidence never explained, the items were not acceptable equity, Jones proved that he was capable of making the entire equity injection in cash if necessary and his attorney pledged this would occur. It was simply false that he was not capable of making the equity injection. The Court of Appeals appears to suggest that proof of the ability to make the injection was not provided, while not addressing the issue that Jones had already proven the injection through expenditures. It erroneously construed material facts in favor of the movant in violation of the standards for summary judgment. Parasco v. Pacific Indemnity Co. 920 F. Supp. 647 (E.D. Pa. 1996); Levin v. Marder, 343 F. Supp. 1050 (D.C. Pa. 1972). The Court appears to have accepted at point blank all of defendant's reasons, particularly regarding collateral and equity, while ignoring plaintiff's evidence which call into question genuine issues of material fact. For example, the Court of Appeals' opinion suggests that PMBDA had the

right to reject the collateral at 6009 Magnolia Street merely because of its' low purchase price. This was despite that the evidence (see above) proved that professional appraisal, not purchase price was PMBDA's own documented procedure for valuing collateral.

Additionally, regarding equity, the Court of Appeals seems to discount the viability of the business equipment in total because it appears that it already belonged to Street Sounds. This was despite that Jones provided evidence that: (1) preloan investment could be counted for equity; (2) Carolina testified that the property should have been counted for equity; (3) most astoundingly, PMBDA had already credited the equipment for collateral purposes at $5,000.00. It simply is beyond belief how hard assets can have a monetary value for collateral, but those same assets have zero value for equity, despite that they are the same assets to be used to produce the music, the purpose of the loan. Finally, Ms. Smith's July 27, 1995 letter put Mr. Jones on notice that he was not to purchase new equipment prior to a loan closing. Thus, PMBDA did not contemplate that he needed new equipment to start his business. Jones has provided direct and circumstantial evidence directly rebutting every reason defendant gave for rescindment, going well beyond the mere scintilla standard. Boyle v. County of Allegheny Pennsylvania, 139 F. 3d, 386, 389 (3d Cir. 1998).

B. A Plaintiff in an Americans with Disabilities Act Title II Claim Must Survive Summary Judgment When He is Able to Prove That Discrimination Played A Part in an Adverse Action Against Him

The substantive standards for deciding discrimination cases under Title VII employment cases are applicable to

actions under the Americans With Disabilities Act (ADA). Antol v. Perry, 82 F. 3d 1291 (3d Cir. 1995).

As stated above, Jones provided an abundance of direct evidence that PMBDA's decision against him was at least based in part on disability discrimination (see statement of the case above). Direct evidence is that which requires no or little inferential step to conclude discriminatory decision making Aman v. Cort Furniture Rental Corp, 85 F.3d 1074, 1081 (3d Cir. 1996). If such direct evidence exists, the decision maker must prove that the same decision would have been made, even if it had not based its' decision on illegal considerations. Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1787-88 (1989).

The Court of Appeals failed to apply the standard from Price Waterhouse, supra. rather it totally discounted the evidence of discrimination as "inquiries" and as irrelevant to the issue of whether program requirements were met. This was error. The evidence provided above in the statement of the case proves that Smith's comments (reflecting her state of mind) were not inquiries, rather they were edicts that a loan could not be done. The derogatory references and inappropriate consideration of disability extended throughout the loan process. It is impossible for the Court on summary judgment to rule as a matter of law, that disability discrimination played no role in Smith's decision for loan rescindment particularly when the reasons in her September 9, 1996 letter have been discredited.

As the evidence above shows, there can be no more direct evidence, than Ms. Smith stating "we can't help, this guy is on permanent disability" R. 194. Carolina testified regarding Smith: "it was like we can't help this guy or we can't do a deal because there is disability." R. 191.

The Court of Appeals erred by not requiring proof that PMBDA would have made the same adverse decision in the absence of Ms. Smith's disability discrimination. It must be noted that Smith's comments reflect the noxious stereotyping that disabled people, particularly mentally disabled (as she believed) are not worthy of consideration in the economy, similar obviously to the sex stereotyping in Price Waterhouse v. Hopkins, supra., but more egregious. In Price Waterhouse v. Hopkins, supra, the Plaintiff was held to a standard of how women in the workplace should act, e.g. femininely. Here, Smith has decided, on behalf of PMBDA that Jones cannot even participate in the economy due to his disability, at least not if she has anything to do with it.

C. In An Americans With Disabilities Act, Title II Claim, a Plaintiff Must Survive Summary Judgment When He Produces Evidence Directly or Indirectly Contravening the Defendants Proffered Reasons for Its' Adverse Action

Discrimination may be proven circumstantially by proving by a preponderance of evidence that the decision maker's stated reasons for its' action are not the true reason or that those stated reasons are unworthy of belief. McDonnell - Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089 (1981). In St. Mary Honor Center v. Hicks, 509 U.S. 502, 113 S. Ct. 2742 (1993) and more recently, Reeves v. Sanderson Plumbing Products, Inc. 197 F. 3d 688 (2000), the United States Supreme Court has held that discrimination can be proven at trial entirely by proving pretext, e.g. that no additional direct or circumstantial evidence is necessary. The jury's mere disbelief alone of a defendant's proffered reason allows a finding of discrimination. In Reeves, supra, the United States

Supreme Court reversed the Court of Appeals, because Reeves was able at trial to discredit the employer's proffered reasons for his termination. Reeves was an age discrimination case, where other employers over the age of forty were not fired or allegedly mistreated. Here, above in the statement of the case, in addition to the ample direct evidence of disability discrimination, Jones also has been able to discredit all of Smith's and PMBDA's profound reasons for loan rescindment. Not only does he prove that there are issues of material fact for a jury, he exceeds the standard by directly proving all of the reasons are patently false. It should be noted that to survive summary judgment, a nonmovant need not discredit each and every reason given, it is enough to prove the falsity of one. Roebuck v. Drexel University, 852 F.2d 715, 734 (3d Cir. 1988). In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer (defendant) is dissembling to cover up a discriminating purpose. Reeves v. Sanderson, supra.

Moreover, once the decisionmaker's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the decisionmaker is in the best position to put forth the actual reason for its' decision. Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978) Jones evidence presented above overwhelmingly suggests that PMBDA merely did not want to loan to him because of his disability. It lied to him and about him. It violated its' own procedures over and over, evidence of discrimination. Antol v. Perry, 82 F. 3d 1291, 1300 (3d Cir. 1995).

D. In an Americans with Disabilities Act, Title II Claim, The Defendant Has an Unexcusable Burden of Proving What if Any of Its' Program Requirements are Essential Eligibility Requirements

Under the ADA, in determining what is an essential eligibility requirement, the Court cannot rest on the State's characterization of the service, nor its' qualification or eligibility criteria it asserts as necessary, but rather must make on independent inquiry. Straithie v. Department of Transportation, 716 F. 2d 277 (3d Cir. 1983). Despite the Court of Appeals finding that collateral and equity where essential, this finding was not based on any evidence whatsoever from PMBDA. Conversely, Jones provided evidence that collateral was totally excusable if an applicant's net worth exceeded the loan amount. Moreover, he presented evidence that his net worth exceeded the loan amount.

Regarding equity injection, it is undisputable that Jones provided the only proof required prior to a closing by PMBDA's own admission. R. 546. There was no requirement, and particularly no "essential" requirement that Jones preprove his ability to make the equity injection prior to the closing. It is undisputable that PMBDA reneged its' promise to schedule a closing so that the equity injection could be done. Of course, as stated above a cash injection wasn't needed because, Jones had already made the entire injection in business expenditures.

Finally, the commitment letter itself belies any contention of essential eligibility requirements in stating:

> PMBDA reserves the right to waive, in whole or part, any (emphasis added) of the terms or conditions hereof which have been inserted for PMBDA's benefit. R. 786.

Because any and all of the requirements were waivable, including collateral and equity, a reasonable jury could find that none of them were "essential" - that each loan project could be individually tailored depending on PMBDA's assessment of viability.

CONCLUSION

The orders of the United States Court of Appeals for the Third Circuit and the District Court for the Eastern District of Pennsylvania should be reversed and the case should be remanded for trial.

Respectfully submitted,

FINCOURT SHELTON
Attorney for Petitioner
Six North Ninth Street
Suite 201
Darby, Pennsylvania 19023
(610) 532-5550